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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY COUNTRYMAN, Defendant and Appellant.	F075644 (Kern Super. Ct. No. BF166949A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Thomas S. Clark, Judge.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chapman and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Detjen, J. and DeSantos, J.

INTRODUCTION

Appellant/defendant Timothy Countryman was arrested and charged with a felony in Kern County Superior Court case No. BF165607A. He was released on bail and then failed to appear as ordered at a court hearing; a bench warrant was issued for his arrest. Defendant was later detained by a police officer on an unrelated matter. The officer discovered the outstanding bench warrant and arrested him.

After his arrest, defendant was charged in a new case with a felony violation of Penal Code section 1320.5,[1] failure to appear after being charged with a felony in case No. BF1650607A. While his failure to appear case was pending, defendant apparently resolved case No. BF165607A by pleading to a misdemeanor offense.

Defendant was subsequently convicted as charged of felony failure to appear in violation of section 1320.5. On appeal from this conviction, defendant argues the felony must be reduced to misdemeanor failure to appear because the underlying charge in case No. BF165607A was separately resolved as a misdemeanor before he was tried and convicted for failing to appear.

We affirm.

FACTS

The following evidence was introduced at defendant's jury trial in this case for failing to appear in violation of section 1320.5.

Case No. BF165607A[2]

On September 8, 2016, defendant was arrested by the sheriff's department and booked into custody. On September 22, 2016, defendant appeared for a "felony

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[1] All further statutory citations are to the Penal Code unless otherwise indicated.

[2] At defendant's jury trial for failing to appear, the People introduced certified copies of several documents from case No. BF165607A, to establish that defendant had been charged with a felony and failed to appear in that matter. However, the original complaint in case No. BF165607A was not introduced and is not part of the instant record.

arraignment," the court set bail, defendant posted bail, and he was ordered to appear on October 4, 2016, for the pre-preliminary hearing.

On October 4, 2016, defendant failed to appear as ordered for the pre-preliminary hearing. The court ordered the bail bond forfeited, issued a bench warrant, and vacated the preliminary hearing.

Case No. BF166949A

At 10:00 p.m. on October 19, 2016, Bakersfield Police Officer Barrier responded to a report of a suspicious vehicle that was outside a gated residential community in east Bakersfield.

Officer Barrier found a car parked at the front gate. He approached the vehicle and spoke to defendant, who was the driver and sole occupant. Defendant identified himself by his true name. Barrier conducted a records search and determined there was an outstanding warrant for defendant's arrest in case No. BF165607A.

Officer Barrier arrested defendant on the outstanding warrant and took him into custody.[3]

On October 24, 2016, defendant appeared in case No. BF165607A on the return of the bench warrant.

PROCEDURAL HISTORY

On January 20, 2017, as a result of defendant's arrest on the bench warrant, a complaint was filed in a new case (No. BF166949A; the instant appeal) that charged defendant with a felony violation of section 1320.5, that on or about October 4, 2016, he was "a person who was charged with the commission of a felony, to wit: a violation of … section 666.5(a) [and] 496d(a) who was released from custody on bail and, in order

[3] During pretrial motions in this case, the prosecutor stated that when Officer Barrier arrested defendant on the bench warrant, he found defendant in possession of methamphetamine, marijuana, 14 "shaved" keys, and two "electronic vehicle keys." The court excluded this evidence from the trial in his failure to appear case.

to evade the process of the court, willfully and unlawfully failed to appear as required on October 4, 2016."[4]

The complaint also alleged an on-bail enhancement (§ 12022.1) and seven prior prison term enhancements (§ 667.5, subd. (b)).

Resolution of Case No. BF165607A

At the preliminary hearing and during pretrial motions in the failure to appear case, the prosecutor and defense counsel stated that on January 30, 2017, defendant pleaded no contest in case No. BF165607A to a misdemeanor violation of Health and Safety Code section 11377, subdivision (a), possession of a controlled substance.

The Information

On February 23, 2017, the information was filed against defendant, that again alleged a felony violation of section 1320.5, failure to appear, using the same language as in the complaint; with an on-bail enhancement (§ 12022.1) and seven prior prison term enhancements (§ 667.5, subd. (b)).

Trial Motions

On April 5, 2017, the court heard motions in defendant's failure to appear case.

Defendant filed a motion in limine to dismiss the on-bail enhancement and argued it was no longer applicable. Defendant stated that that on January 30, 2017, case No. BF165607A was resolved because the charged offense was "reduced" from a felony to a misdemeanor and defendant pleaded no contest.

The People did not oppose the dismissal of the on-bail enhancement. However, the People moved to prevent defense counsel from stating before the jury that case No. BF165607A was resolved as a misdemeanor. Defense counsel objected and argued

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[4] As we will explain, section 496d, subdivision (a) and section 666.5, subdivision (a), when charged together, allege a felony violation for buying or receiving a stolen motor vehicle with a prior conviction for a similar offense. (*People v. Lee* (2017) 16 Cal.App.5th 861, 869–870.)

that a violation of section 1320.5 required evidence of defendant's specific intent to evade the process of the court, and it was significant the case was resolved as a misdemeanor because it undermined defendant's intent to evade.

The Court's Pretrial Rulings

The court dismissed the on-bail enhancement.

The court granted the People's motion to prevent the defense from introducing any evidence to the jury about the resolution of the underlying case. The court found there was no evidence defendant knew the prior case was going to be resolved as a misdemeanor when he failed to appear as ordered.

Conviction and Sentence

On April 10, 2017, defendant's jury trial was held for failing to appear in violation of section 1320.5. After the prosecution rested, defense counsel moved for a directed verdict. The court denied the motion and found sufficient evidence defendant had been charged with a felony in case No. BF165607A when he failed to appear.

The defense presented no evidence.

The jury convicted defendant as charged of felony failure to appear in violation of section 1320.5. The court found five of the prior serious felony enhancements true and dismissed the remaining two allegations.

Sentence

Defendant filed postverdict motions for the court to exercise its discretion pursuant to section 17, subdivision (b) and reduce his felony conviction for violating section 1320.5 to a misdemeanor[5] and to dismiss the prior prison term enhancements. Defendant argued the motions should be granted because the underlying case was

[5] As we will discuss, a conviction for failure to appear in violation of section 1320.5 is a "wobbler" offense, punishable as a felony or misdemeanor. Defendant was charged and convicted of felony failure to appear in this case.

resolved as a misdemeanor, defendant was not a danger to society, his prior record consisted of low-level theft and drug offenses, and the current offense was nonviolent.

The People filed opposition to defendant's motions and argued defendant had to be forcibly returned after failing to appear; he had a lengthy prior record; he been sentenced to a total of 11 years in custody as a result of felony convictions that occurred since he became an adult in 1991; and his prior record included three felony convictions for vehicle theft, felony attempted vehicle theft, and felony transportation of narcotics for sale.

On May 4, 2017, the court conducted the sentencing hearing. It denied defendant's motions to reduce his conviction to a misdemeanor and dismiss the prior prison term enhancements, and cited defendant's lengthy prior record and consistent pattern of continued criminality.

The court sentenced defendant to the midterm of two years for failing to appear, plus five consecutive one-year terms for the enhancements, for an aggregate term of seven years. The trial court imposed a split sentence under which defendant would serve the first three years in jail and the remaining four years on supervised release.

DISCUSSION

I. Defendant's Motion for Judicial Notice

On appeal, defendant has not challenged the sufficiency of the evidence in support of his conviction for failure to appear, or the court's denial of his motion to exercise its discretion and reduce his felony conviction to a misdemeanor pursuant to section 17, subdivision (b).

Instead, defendant argues his conviction for felony failure to appear must be reduced to a misdemeanor by operation of law, because the underlying case No. BF165607A was resolved as a misdemeanor prior to his trial for failing to appear. In making this argument, defendant relies on a series of cases that have addressed the reduction of felony convictions to misdemeanors pursuant to Proposition 47. (Prop. 47,

as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2015.) Defendant argues that he pleaded no contest to a misdemeanor in the underlying case, so that the instant conviction for failing to appear also must be reduced to a misdemeanor.

Defendant acknowledges that he did not raise this specific issue before the trial court but argues this court may address it on appeal because it involves a pure question of law.

The People assert defendant cannot raise this argument on appeal because he failed to raise it before the trial court, it involves a mixed question of fact and law, and he never introduced any evidence at trial about the nature of the charges in case No. BF165607A, such as the original complaint or exactly how the case was resolved. The People argue defendant's argument raises a disputed question of fact that is not appropriate on appeal because it is not clear from the appellate record whether the felony in the underlying case was reduced to a misdemeanor pursuant to Proposition 47, or whether defendant was charged with felony drug possession in the underlying case, and it was later reduced to a misdemeanor pursuant to the plea.

In response, defendant filed a motion with this court to take judicial notice of a document to clarify the resolution of case No. BF165607A. We begin with that motion.[6]

A. The January 30, 2017, Minute Order from Case No. BF165607A

Defendant filed a motion for this court to take judicial notice of a minute order for January 30, 2017, in case No. BF165607A, to show how that case was resolved. Defendant attached the minute order as an exhibit to the motion.

According to the minute order, defendant had been charged in case No. BF165607A with count 1, violation of section 666.5, subdivision (a) and section 460d, subdivision (a) (felony receiving a stolen vehicle with a prior conviction), with

[6] We deferred ruling on the motion for judicial notice pending consideration of the appeal on the merits.

seven prior prison term enhancements; count 2, a misdemeanor violation of Health and Safety Code section 11377, subdivision (a) (possession of a controlled substance); and count 3, a misdemeanor violation of Health and Safety Code section 11364 (possession of narcotics paraphernalia).[7]

Also, according to the minute order, on January 30, 2017, prior to defendant's trial for failing to appear, defendant pleaded no contest in case No. BF165607A to count 2, the misdemeanor violation of Health and Safety Code section 11377, subdivision (a). The court granted the People's motion to dismiss counts 1 and 3 and ordered the enhancements stricken. Defendant was placed on probation for three years and ordered to serve 14 days in jail. The court also exonerated the bail bond.[8]

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[7] Section 496d, subdivision (a) prohibits buying or receiving a stolen motor vehicle, and it is punishable as a felony or misdemeanor. "Section 666.5 is an alternate punishment scheme that prescribes an elevated sentencing triad for recidivist car thieves who have a prior felony conviction for car theft or related conduct." (*People v. Lee*, *supra*, 16 Cal.App.5th at pp. 869–870, fn. omitted.) Section 666.5 states, "Every person who, having been previously convicted of a felony violation of Section 10851 of the Vehicle Code, or felony grand theft involving an automobile …, or felony grand theft involving a motor vehicle …, or a felony violation of Section 496d …, is subsequently convicted of any of these offenses shall be punished by imprisonment for two, three, or four years …." (§ 666.5, subd. (a).)

[8] Defendant initially filed his motion for judicial notice of the minute order with this court on November 14, 2017. However, attached to the motion was a lengthy document identified as a "CJIS" printout of docket entries for January 30, 2017, and not a minute order. The People filed opposition to the motion because the attached document was not a minute order.

On February 8, 2018, defendant withdrew his prior motion for judicial notice and acknowledged that the attached document was not a minute order. He filed a supplemental motion for this court to take judicial notice and attached a copy of the minute order of January 30, 2017, in case No. BF165607A, which we have addressed above.

We note that the CJIS docket entries that defendant attached in his first motion for judicial notice are consistent with the January 30, 2017, minute order, and state that defendant was charged in case No. BF165607A with count 1, identified as a "F" violation of section 496d, subdivision (a) and section 666.5, subdivision (a), with seven prior prison term enhancements; count 2, a misdemeanor violation of Health and Safety Code section 11377, subdivision (a); and count 3, violation of Health and Safety Code

B. The People's Opposition to Judicial Notice

The People filed opposition to defendant's motion for this court to take for judicial notice of the minute order. The People argued it was irrelevant to the issue in this case as to whether his felony conviction for failing to appear should be reduced to a misdemeanor. The People further argue the minute order just shows the underlying case was resolved as a misdemeanor, and that only the complaint would show what defendant was originally charged with.

C. Analysis

Defendant contends this court should take judicial notice of the minute order to clarify that his prior case was resolved by his plea to the charged misdemeanor in count 2 and supports his appellate argument that his felony conviction for failure to appear must be reduced to a misdemeanor by operation of law.

We will address the merits of defendant's argument in issue II. As for his motion, however, an appellate court may properly decline to take judicial notice under Evidence Code sections 452 and 459 of a matter that should have been presented to the trial court for its consideration in the first instance. (*People v. Preslie* (1977) 70 Cal.App.3d 486, 493; *People v. Superior Court* (*Mahle*) (1970) 3 Cal.App.3d 476, 482, fn. 3, overruled on other grounds in *People v. Turner* (1984) 37 Cal.3d 302, 318.)

We deny defendant's motion to take judicial notice of the January 30, 2017, minute order because it was never introduced at trial or in support of any pre- or posttrial motions. Defendant was well aware that the complaint and information clearly alleged he failed to appear after being charged with committing a felony offense in case No. BF165607A. During pretrial motions, the prosecutor and defense counsel advised the court that defendant had resolved the prior case with a misdemeanor plea. The court denied defense counsel's request to advise the jury about the misdemeanor plea.

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section 11364; and that on January 30, 2017, he pleaded no contest to misdemeanor count 2, and the court dismissed counts 1 and 3 and the enhancements.

However, defense counsel never argued the plea barred his felony conviction for failure to appear, or that he had only been charged with a misdemeanor when he failed to appear. Defendant did not submit any evidence raising these claims in his motion to reduce the conviction to a misdemeanor.

The instant record does not contain the complaint or information that was filed in case No. 165607A. As noted above, however, both the complaint and information that were filed in this case alleged a felony violation of section 1320.5 – that defendant had been charged with a felony in case No. BF165607A, with violations of section 496d, subdivision (a) and section 666.5, subdivision (a), when he failed to appear on October 4, 2016.

Thus, the allegations in the complaint and information filed in this case clarify that defendant had been charged with a felony in case No. BF165607A and do not dispute the trial evidence on that issue.

We further note that even if this court took judicial notice of the minute order, it recites the pending charges in case No. BF165607A: the felony violation based on sections 496d and 666.5, and two misdemeanor drug charges. Defendant pleaded to count 2, misdemeanor possession of a controlled substance, and the court dismissed counts 1 and 3 and the prior prison term enhancements.

As we will explain, the manner in which defendant was convicted of a misdemeanor in case No. BF165607A will not affect his felony conviction in this case for failing to appear.

II. Defendant's Conviction for Failing to Appear Cannot be Reduced to a Misdemeanor

Defendant argues that his felony conviction for failing to appear must be reduced to a misdemeanor offense as a matter of law, since he resolved the underlying matter though a misdemeanor plea in case No. BF165607A prior to his jury trial for failing to appear.

A. Section 1320.5

Section 1320.5 defines the offense of willful failure to appear.

> "Every person w*ho is charged with or convicted of the commission of a felony*, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony. Upon a conviction under this section, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000) or by imprisonment pursuant to subdivision (h) of Section 1170, or in the county jail for not more than one year, or by both the fine and imprisonment. Willful failure to appear within 14 days of the date assigned for appearance may be found to have been for the purpose of evading the process of the court." (Italics added.)

A violation of section 1320.5 is a "wobbler" offense and punishable as a felony by imprisonment in state prison, or as a misdemeanor with custody in county jail. (§ 1320.5; § 17, subd. (b).) The statute applies to both pre- and postconviction failures to appear while released on bail. (*People v. Jimenez* (1993) 19 Cal.App.4th 1175, 1177–1181.)

Section 1320.5 is a specific intent crime. (*People v. Wesley* (1988) 198 Cal.App.3d 519, 522.) "Not only must the individual intend to fail to appear, but also he or she must intend the failure to appear to 'achieve some additional purpose,' i.e., 'to evade the process of the court.' " (*Ibid*.) "The elements of this felony manifest a crime that is at heart a crime of deceit: the defendant has been granted liberty from custody on the promise he will be present in the future proceedings against him, and then purposefully breaches that promise ' "to postpone hearings and waste time, hoping that witnesses will disappear or forget what happened." [Citation.]' [Citation.] Because deceit is inherently dishonest conduct, failure to appear is a crime of moral turpitude." (*People v. Maestas* (2005) 132 Cal.App.4th 1552, 1556–1557.)]

The offense of failure to appear is premised on a defendant's breach of contract (*People v. Jenkins* (1983) 146 Cal.App.3d 22, 28), so that whether a defendant is convicted of the underlying offense has been held immaterial to the disposition of the failure to appear charge. (*People v. Walker* (2002) 29 Cal.4th 577, 583 (*Walker*).)

"[T]he gravamen of section 1320.5 is the defendant's act of jumping bail and consequent evasion of the court's process…." (*Id*. at p. 585, fn. omitted.)

> "With respect to section 1320.5, the legislative history states explicitly that its purpose is 'to deter bail jumping.' [Citations.] The language and history of section 1320.5 also reflect the Legislature's view that fulfillment of this purpose requires punishment *whether or not the defendant ultimately is convicted of the charge for which he or she was out on bail when failing to appear in court as ordered*. [Citations.]" (*Id*. at p. 583, italics added.)

B. Buycks

Defendant acknowledges the holding in *Walker* but argues it has been undermined by the provisions of Proposition 47 that allow a court to reduce a felony conviction to a misdemeanor, so that the conviction must be treated as a misdemeanor "for all purposes" (§ 1170.18, subd. (k)).

Defendant argues that if he had been convicted of a felony in case No. BF165607A and it was reduced to a misdemeanor pursuant to Proposition 47, then it would have been treated as a misdemeanor for all purposes and he could not have been convicted of a felony violation of failing to appear in this case. Defendant further asserts that since he entered a misdemeanor plea in the underlying case before his trial for failing to appear, equal protection of the law requires that he receive the same benefit as if the prior offense had been reduced to a misdemeanor under Proposition 47.

On further briefing, defendant concedes the California Supreme Court has resolved this issue adversely to his position. In *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), the court resolved a series of cases regarding the treatment of felony convictions reduced to misdemeanors under the provisions of Proposition 47 and section 1170.18, subdivision (k), including the issue of "whether Proposition 47 requires the dismissal of a failure to appear for a felony charge under section 1320.5 when the underlying felony has subsequently been reduced to a misdemeanor under the initiative." (*Buycks*, *supra*, at p. 871.)

Buycks affirmed the decision in *Walker, supra,* 29 Cal.4th 577 and held "Proposition 47 did not affect [the defendant's] status as a person charged with a felony at the time of his failure to appear," even though the underlying offense had been reduced to a misdemeanor. (*Buycks, supra*, 5 Cal.5th at pp. 872, 896–897.)

> "[C]onsidering that a section 1320.5 conviction does not require the bail jumper's felony charge to have resulted in a felony conviction, *or in any conviction at all*, the fact that [the defendant] successfully petitioned to have his narcotics offense reduced to a misdemeanor under Proposition 47 did not have any collateral effect on his section 1320.5 conviction. Under section 1170.18, subdivision (k), [defendant's] 'felony conviction' for his narcotics offense became 'a misdemeanor for all purposes,' but that did not alter the fact that *he had been charged with a felony when he failed to appear while on bail for that felony charge*. Accordingly, under these circumstances, [defendant's] conviction for section 1320.5 does not qualify for resentencing under Proposition 47." (*Id*. at p. 892, italics added.)

Defendant acknowledges this court is bound to follow *Buycks* but seeks to preserve constitutional arguments for future review. We acknowledge defendant's arguments and are compelled to follow the court's rulings in *Buycks* and *Walker* to find that, based on the evidence presented at trial, defendant had been charged with a felony offense in case No. BF165607A when he was released on bail and failed to appear as ordered on October 4, 2016.

Defendant's felony conviction for failing to appear in violation of section 1320.5 is affirmed.[9]

DISPOSITION

Defendant's motion for judicial notice is denied.

The judgment is affirmed.

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[9] We would reach the same finding even if this court granted defendant's supplemental motion for judicial notice of the minute order, since it does not refute the trial evidence that defendant had been charged with a felony offense when he failed to appear in the prior case.